Supreme Court, U.S.
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No. 99-1059

IN THE

Supreme Court of the United States

GARY L. HOOPER,

Petitioner,

v.

CARGILL, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Cargill, Incorporated, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Procedural History

On June 17, 1997, Petitioner, Gary Hooper ("Hooper"), filed his Complaint in the United States District Court for the Middle District of Tennessee, asserting claims under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, and the Tennessee Human Rights Act ("THRA"), Tenn. Code Ann. §§ 4-21-101 *et seq.* (Joint Appendix ("App.") at 6).[1] Respondent, Cargill, Inc. ("Cargill"), filed its Answer on July 25, 1997. (App. at 24). On March 13, 1998, Cargill filed a Motion for Summary Judgment. (App. at 31). On June 12, 1998, the District Court entered its Memorandum Opinion (App. at 10) and Order (App. at 22) granting Cargill's Motion for Summary Judgment.

On June 23, 1998, Hooper filed a Notice of Appeal from the District Court's Summary Judgment Order. (App. at 23). On July 23, 1999, the Sixth Circuit Court of Appeals issued its decision affirming the District Court's grant of summary judgment to Cargill (Petition for Writ of Certiorari ("Petition") at A-1).[2] The Sixth Circuit Court of Appeals denied Hooper's Petition for Rehearing and Suggestion for Rehearing *En Banc* on September 23, 1999. (Petition at A-18). Finally, on December 21, 1999, Hooper filed his Petition for Writ of Certiorari to the Supreme Court of the United States, to which Cargill now timely responds.

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1. All citations to the Joint Appendix on file with the Sixth Circuit Court of Appeals are referenced herein as "App."

2. All citations to the Petition for Writ of Certiorari are referenced herein as "Petition."

B. Events Leading To the Reduction in Force at Cargill

Hooper was employed at Cargill's steel and wire facility in Nashville, Tennessee. As of May 1995, the Nashville facility was not meeting corporate expectations. Consequently, Cargill removed the general manager, and Frank Gettys became the new general manager in May 1995. (App. 10-11). Gettys was charged to "turn around" the Nashville facility.[3] To further complicate the operational and financial problems in Nashville, Cargill received word in March 1996 that its largest customer, Johnson Controls, Inc. ("JCI"), would no longer purchase steel from the Nashville facility. The Nashville facility stood to lose 20% of its business because of this decision. (App. at 108, 123).[4]

Because of the significant drop in needed production levels, Gettys instructed Bob Pittard, the Plant Manager, to "size the operation" (reduce the staff) to a level appropriate to produce the lesser amount of steel after the JCI contract expired. (App. at 107-08, 119, 122, 124-25, 131, 162, 180).

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3. To turn the plant around, Gettys initiated several cost saving initiatives. Specifically, Gettys: (1) eliminated the third shift; (2) avoided replacing employees whose employment terminated; (3) lowered the level of inventory from 80,000 tons of steel to 35,000 tons; (4) eliminated the guard service (which saved in excess of $80,000 per year); (5) reduced the facility's working capital by 43%; and (6) reduced the facility's short-term interest from $114,000 per month to $15,000 per month. (App. at 10-11, 107-08, 122-23, 127-28, 179).

4. Prior to the JCI loss, the Nashville facility was producing 15,000 tons per month. At the end of the JCI contract, in June 1996, the facility's volume was only 11,000 tons per month. Additionally, total sales for fiscal year 1996 (June 1995-May 1996) dropped over 29% from fiscal year 1995. (App. at 107-08, 122-23, 179).

Gettys did not give Pittard any specific direction on how many positions to eliminate or who to select. (App. at 124-25, 180).

C. Hooper's Dismissal as Part of the Reduction in Force

Pittard began reviewing the operation in May 1996 to resize and realign the plant's management structure and salaried work force.[5] (App. at 134, 181-82). Pittard did not look at salaries or a specific number of positions to eliminate, but rather considered the number of people and positions that would be needed to operate at the reduced level. (App. at 122, 135, 171, 182-83). After an extensive review, Pittard decided to eliminate certain positions and to combine the functions of other positions.

Before the realignment, Hooper held the position of First Shift Production Supervisor (supervising the first shift production employees) and Robert Tigg held the position of Production Coordinator (supervising the shipping department and the scheduling department). (App. at 203, 211, 214). In Pittard's proposal to Gettys about resizing and realigning the salaried work force, the job title of Production Coordinator (Tigg's old position) was eliminated. Many of the duties of the First Shift Production Supervisor (Hooper's

5. When Gettys arrived at the Nashville facility in May 1995, the production employees reported to Production Supervisors (Gary Hooper, then age 45, and Carl Allen, then age 53), who reported to a Production Manager (Russell Drake, then age 43), who, in turn, reported to the Plant Manager (Bob Pittard, then age 41). (App. at 105-06, 110-14, 141-44). Eventually, the Quality Assurance Manager resigned and Drake moved into that position and his former position of Production Manager was eliminated. (App. at 88-89, 153). Thereafter, the Production Supervisors, Hooper and Allen, reported directly to the Plant Manager, Pittard. (App. at 89-90, 153).

position) and the duties of the Production Coordinator (Tigg's position) would be combined. Further, the Second Shift Production Supervisor's duties and the duties of the Safety Coordinator would also be merged into one position. (App. at 188, 209-10, 212-14).[6] As a result of this consolidation, there would be fewer supervisors and the remaining supervisors would be doing a greater variety of work. (App. at 131).

Pittard determined who he thought was best suited for the "new, realigned" positions that would remain. (App. at 109, 190-93). Pittard concluded that Robert Tigg's past and potential performance and skills better suited him to perform all of the duties of the new First Shift Production Supervisor position.[7] (App. at 191-93). Specifically, Tigg possessed the computer skills necessary for the new position; skills that Hooper did not have. (App. at 191; Petition at A-34). Accordingly, in Pittard's business judgment, Hooper "did not have the best performance for the position that was

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6. In addition, other jobs would be eliminated (such as the Production Clerk) and their duties merged into and assumed by other existing positions, resulting in new positions with greater fields of responsibility. (App. at 188, 209-10, 212-14).

7. As a result of the realignment, Tigg, without any adjustment in pay, moved into the "new" First Shift Production Supervisor position, where he continued to supervise the shipping and scheduling departments, in addition to supervising the first shift production employees who were formerly supervised by Hooper. (App. at 63-64, 90-91, 184-86, 209-10, 212-15). Hooper's other former responsibilities, including administrative duties (such as purchasing of plant supplies, handling employee records and time cards), were distributed to other existing employees. Like Tigg, these other employees also performed Hooper's former duties in addition to their own duties. (App. at 185).

available." (App. at 194, 206). Thus, as a result of the proposed reorganization of the salaried work force, the services of a number of salaried employees, including Hooper, would no longer be needed. (App. at 139, 188).

After making his proposal to Gettys, and pursuant to corporate policy, Pittard then evaluated employees for the remaining positions against stated criteria using standard Cargill evaluation grids. (App. at 109, 165-67, 195, 197-99, 206). Pittard completed the evaluation grids for the affected employees with respect to the positions that would exist after the reduction in force, keeping in mind the additional or increased job responsibilities and increased level of performance that would be expected. (App. at 109, 195, 197-99, 206). The objective of this process "was to have the best performers with the highest potential remaining following the reduction" in force. (App. at 172).

Including Hooper, a total of eight employees were separated from employment in the reduction in force that occurred in June 1996. (App. at 106). Five of the eight employees who were laid off were younger than Hooper. What's more, many employees who were *older* than Hooper were retained after the reduction in force. (App. at 61-62, 65-66, 72, 93, 133). In fact, 18 employees older than Hooper (ages 47 to 60)[8] remained employed after the reduction in force. (App. at 105-06, 110-14).

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8. W. Masters (**age 53**), T. Sibley (**age 48**), C. Allen (**age 54**), W. Butler (**age 50**), J.B. Dodson (**age 50**), E. Garret (**age 51**), J. Garret (**age 47**), H. Tate (**age 54**), W. Robertson (**age 47**), D. Howland (**age 48**), J. Humphrey (**age 49**), G. James (**age 55**), J. Johnson (**age 51**), W. Jones (**age 52**), J. Majors (**age 50**), L. Mangrum (**age 55**), G. Page (**age 47**), W. Parker (**age 60**). (App. at 105-06, 110-14).

REASONS FOR DENYING THE WRIT

A. The Decision of the Court of Appeals Regarding Hooper's Failure to Establish a *Prima Facie* Case is Fully in Accord with the Decisions of Other Circuit Courts of Appeal.

Hooper claims "the Sixth Circuit held that in a reduction in force proceeding unless the terminated employee is actually replaced by a retained younger employee plaintiff is unable to establish a *prima facie* case by showing his duties were assumed by younger, less qualified employees."[9] (Petition at 8). Hooper has mis-stated both the holding of the court below and the standard for establishing a *prima facie* case in the Sixth Circuit.

The opinion of the Sixth Circuit in the case *sub judice* stated succinctly that, "If his employer did not replace him, the plaintiff cannot state a *prima facie* case *without* presenting 'evidence sufficiently probative to allow a fact finder to believe that the employer intentionally discriminated against the plaintiff because of age'." (Petition at A-4) (emphasis added) (citing *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir.), *cert. denied*, 498 U.S. 878, 111 S. Ct. 211, 112 L. Ed. 2d 171 (1990)). From this language, it is clear that a plaintiff in the Sixth Circuit can establish a *prima facie* case either by showing he was replaced by a substantially younger individual[10] or by presenting "evidence sufficiently

9. By this statement, Hooper implicates the fourth element of the *prima facie* case; the first three elements are not in dispute.

10. Replacement by a substantially younger individual is at least one method of creating an inference of age discrimination as held by this Court in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996).

probative" of intentional age discrimination. Thus, Hooper's contention that a plaintiff must show that he was "actually replaced by a retained younger employee," (Petition at 8), is simply wrong.

Using his faulty assessment of the Sixth Circuit's standard as a basis for argument, Hooper cites opinions from the First, Second and Seventh Circuits in an attempt to support his contention that there is a split in the circuits regarding the standard for establishing a *prima facie* case in a reduction in force situation.[11] Of these three cases, one is distinguishable because it is not a reduction in force case,[12] and the other two cases reflect the same *prima facie* standard applied by the Sixth Circuit.

Hooper cites *Cronin v. Aetna* in his attempt to show a split in the circuits. The Second Circuit in *Cronin* stated that the fourth element of a *prima facie* case in a reduction in force situation is satisfied when a plaintiff can present evidence "that the discharge occurred under circumstances giving rise to an inference of age discrimination." *Cronin*,

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11. The cases cited by Hooper are *Miller v. Borden, Inc.*, 168 F.3d 308 (7th Cir. 1999); *Brennan v. GTE Gov't Sys. Corp.*, 150 F.3d 21 (1st Cir. 1998); *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196 (2nd Cir. 1995). (Petition at 8).

12. Hooper cites *Miller v. Borden* as a reduction in force case. However, the case in *Miller* involved only a single discharge and the *Miller* court itself very carefully distinguished it from "a RIF or 'reduction in force' " case. *See Miller*, 168 F.3d at 313 & n.1. The Sixth Circuit opinion in the case *sub judice* also points out that *Miller* does not apply in this situation: "*Miller* considers the burdens attending a case of a single discharge, not a reduction in force, and the opinion distinguishes reduction in force from single discharge cases." (*See* Petition at A-7 n.1).

46 F.3d at 204 (citations omitted). The Sixth Circuit in *Barnes* stated that the fourth element of the *prima facie* case can be made by showing that the person was "replaced,"[13] *or* by establishing "evidence sufficiently probative to allow a fact finder to believe that the employer intentionally discriminated against the plaintiff because of age." *Barnes*, 896 F.2d at 1466.[14] In both circuits, a plaintiff must present evidence that would allow a jury to believe that age discrimination occurred. Thus, despite the slight difference in semantics, it is clear that the standard required for the fourth element of the *prima facie* case is the same.

Finally, Hooper cites *Brennan v. GTE Government Systems Corp.* for the proposition that the First Circuit's *prima facie* requirements are also inconsistent with that of the Sixth Circuit. (Petition at 8). The *Brennan* court articulated the fourth element of a *prima facie* case in a RIF situation as the "employer did not treat age neutrally or younger persons were retained in the same position." *Brennan*, 150 F.3d at 26. Once again, the semantics vary from the Sixth Circuit, but the standard remains the same. That is, in a reduction in force case, a plaintiff must show some evidence that an inference of age discrimination could be drawn from the circumstances attending the plaintiff's discharge.

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13. "A person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work." *Barnes*, 896 F.2d at 1465.

14. The *Barnes* court provided a couple of examples stating that, "A plaintiff could establish a *prima facie* case by showing that he or she possessed qualifications superior to those of a younger co-worker working in the same position as plaintiff. . . . [Or a] plaintiff could show that the employer made statements indicative of a discriminatory motive." *Barnes*, 896 F.2d at 1466.

Hooper's attempt to create the illusion of a split in the circuits on this issue is akin to trying to substantively distinguish between "six" and "a half dozen" simply because the words are different. While it is true that various circuits word their *prima facie* case language differently, the primary focus is whether an inference of age discrimination can be drawn from the surrounding circumstances. In fact, the *McDonnell Douglas* analysis anticipates variation in the language. *See Burger v. New York Institute of Technology*, 94 F.3d 830, 834 (2d Cir. 1996) ("The *McDonnell Douglas* analysis is neither 'rigid' nor 'mechanized' and *the primary focus is always* whether an employer treats an employee less favorably than other employees for an impermissible reason.") (emphasis added). Thus, for all of the foregoing reasons, Hooper has not established that there is a split in the circuits regarding the elements of a *prima facie* case in a reduction in force situation. The Petition for Writ of Certiorari should be denied on this basis.

B. There is Also No Split in the Circuits Regarding the Types of Evidence That a Plaintiff May Use to Establish a *Prima Facie* Case.

Hooper's premise that the circuits are split regarding the consideration of various types of evidence during the *prima facie* analysis is also faulty. Specifically, Hooper focuses on statistical information, personnel policies applied inconsistently to persons of different ages, and age-biased statements. Where these criteria "allow a fact finder to believe that the employer intentionally discriminated against the plaintiff because of age," *Barnes*, 896 F.2d at 1466, they may be used as evidence in the Sixth Circuit or *any* circuit

to establish the fourth element of a *prima facie* case.[15] Simply because *Hooper's evidence* was insufficient to rise to the level of showing an inference of age discrimination does not mean there is a split in the circuits.

Hooper claims that "Defendant's failure to follow its own policies *permits* an inference of age discrimination." (Petition at 10).[16] Hooper further alleges that an employer's discredited reason for termination *can be* a basis for an inference of age discrimination (Petition at 11)[17], and that statistics *can be* considered along with other evidence for purposes of a *prima facie* case. (Petition at 11).[18] This is all true. It is also true in the Sixth Circuit.

Under the plain language of the *Barnes* opinion, this type of evidence may be considered by the Sixth Circuit in a plaintiff's attempt to establish *prima facie* evidence of age discrimination. However, the simple fact is that none of the evidence proffered by Hooper was sufficient under all the circumstances to find an inference of discrimination. Thus, Hooper's assertion that the Sixth Circuit does not allow consideration for this type of evidence is mis-stated.

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15. *See, e.g., Skalka v. Fernald Envtl. Restoration Management Corp.*, 178 F.3d 414, 420-22 (6th Cir. 1999); *Herold v. Hajoca Corp.*, 864 F.2d 317, 319-20 (4th Cir. 1988).

16. Citing *Gallo v. Prudential Residential Servs., Ltd.*, 22 F.3d 1219, 1227 (2d Cir. 1994) (emphasis added).

17. Citing *Brooks v. Monroe Systems for Business, Inc.*, 873 F.2d 202, 204 (8th Cir.), *cert. denied*, 493 U.S. 853, 110 S. Ct. 154, 107 L. Ed. 2d 112 (1989) (emphasis added).

18. Citing *EEOC v. NY Times Broadcasting Servs.*, 542 F.2d 356, 360 (6th Cir. 1976) (emphasis added).

Consequently, Hooper's contention that there is a split in the circuits on this issue is simply wrong and his Petition for Writ of Certiorari should be denied on this basis.

C. In Any Event, Summary Judgment Was Correctly Granted and Affirmed Without Regard to Any Alleged Split in the Circuits. -

Summary judgment is appropriate where there is no genuine issue as to any material fact.[19] In the case *sub judice*, both the District Court and the Sixth Circuit Court of Appeals determined that there was no genuine issue of any material fact, and that judgment as a matter of law in favor of Cargill was appropriate. (Petition at A-17, A-37).

In its decision, the Sixth Circuit opined that "[m]aterial facts are those which, under substantive law governing the issue, might effect the outcome of the suit. . . . Mere allegations of a factual dispute are not sufficient to meet this standard." (Petition at A-27).[20] As the Court noted: "Summary judgment is appropriate for the simple reason that there is absolutely no evidence linking the termination to Plaintiff's age." (Petition at A-32).[21] The Court correctly pointed out that: (1) Hooper offered no evidence that Tigg

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19. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

20. Citing *Anderson*, 477 U.S. at 247-48.

21. Citing *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982).

was not qualified for the new position or did not merit his good evaluations; (2) Hooper did not offer evidence showing that he did not deserve his lower evaluation under the higher expectations of the new management; and (3) Hooper has admitted that Cargill terminated employees who were under 40 and retained employees who were over 40 years of age. (Petition at A-33). In fact, the Sixth Circuit opinion provides an excellent discussion of why Hooper's basis for his allegations are either insufficient or unable to establish any genuine issue of material fact. (Petition at A-33 thru A-37).

In Part III of his Petition, Hooper merely states, without providing any specific examples, that the "district court and the panel assumed the jury's function by weighing the evidence and construing the evidence in favor of Defendant and ignoring evidence in support of Plaintiff on the issue of Plaintiff's *prima facie* case." (Petition at 13). In fact, Hooper failed to refute, or even address, any of the specific evidentiary deficiencies detailed by the Sixth Circuit. Thus, because Hooper has *merely asserted* that the District Court and the Sixth Circuit misapplied the summary judgment standards and has not provided a shred of supporting evidence or documentation for this assertion, this basis for granting his Petition for Writ of Certiorari should be denied.

Finally, even if it were assumed that Hooper had established a *prima facie* case, the economic reduction in force and Hooper's inferior skills[22] would satisfy Cargill's burden of articulating a legitimate, non-discriminatory reason for its actions. Applying the burden-shifting analysis set forth

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22. *See* App. at 191; Petition at A-34 (noting Hooper's inferior computer skills).

in *Texas Department of Community Affairs v. Burdine*,[23] the burden of persuasion would again shift to Hooper to demonstrate pretext. However, as noted by the Court of Appeals, Hooper has failed to offer evidence to support even an inference of age discrimination and, certainly, not enough to carry his ultimate burden.[24]

D. The Decision of the Sixth Circuit Court of Appeals is Consistent with the Prior Decisions of This Court.

The Sixth Circuit Court of Appeals below adhered to the sound principles and well-established precedents set by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (establishing the burden shifting framework for employment discrimination cases), *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993) (finding that the termination of an employee for some feature other than age is not violative of the ADEA, even if the feature in question is a corollary to the employee's age (e.g., salary, pension, seniority)), and *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996) (finding that replacement by a person outside the protected class is not a proper element of the *prima facie* case in an ADEA case). Assuming *arguendo* that there is some variation among the circuits concerning the ADEA *prima facie* elements, resolution of such a variation pursuant to the well-established principles and precedents of this Court would not benefit Hooper. Therefore, Hooper's Petition for Writ of Certiorari should be denied.

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23. 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

24. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

CONCLUSION

This case does not merit further review by the Supreme Court. For all of the foregoing reasons, Cargill respectfully requests that this Court deny Hooper's Petition for Writ of Certiorari.

Respectfully submitted,

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